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No. 09-302

In the Supreme Court of the United States

DANIEL MASARIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding expert testimony on the reliability of eyewitness identifications.

2. Whether the exclusion of such testimony violated petitioner's Fifth or Sixth Amendment rights.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 567 F.3d 901.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2009. The petition for a writ of certiorari was filed on September 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of conspiracy to violate federal rights, in violation of 18 U.S.C. 241, and deprivation of federal rights under color of law, in violation of 18 U.S.C. 2 and 18 U.S.C. 242. Petitioner was sentenced to 188 months

of imprisonment, to be followed by three years of supervised release, and to pay restitution. Judgment 1-3, 5. The court of appeals affirmed. Pet. App. 1a-18a.

1. Petitioner was one of several off-duty Milwaukee police officers attending a party that began the evening of Saturday, October 23, 2004, and lasted into the early morning hours. Alcohol was plentiful at the party, and petitioner was intoxicated, as were the other two police officers convicted at trial. Pet. App. 1a-2a; Gov't C.A. Br. 3-4.

The principal victim in this case, F.J., was invited to the party by two of the other guests. F.J. and the rest of his group arrived at the party at approximately 2:40 a.m., but stayed for only a few minutes. Shortly after they departed, partygoers came to believe that someone in F.J.'s group had stolen a police badge belonging to the party host, co-defendant Andrew Spengler. Pet. App. 1a-2a; Gov't C.A. Br. 4.

Based on this mistaken belief, petitioner and others from the party followed the group to a pickup truck and used their authority as police officers to prevent the group from leaving. They then forcibly removed F.J. and L.H. from the truck, with some of the assailants using racial epithets. Pet. App. 2a; Gov't C.A. Br. 4, 7-9. L.H. fled, but F.J. was severely beaten. Bystanders called 911, but the assault continued even after the arrival of the first on-duty officers, and even after F.J. was placed in handcuffs. Petitioner participated in the beating; the evidence of petitioner's involvement included testimony by petitioner's fellow officer Nicole Martinez that petitioner spread F.J.'s legs and kicked him in the crotch multiple times. Pet. App. 2a-3a; Gov't C.A. Br. 15; see *id.* at 10. F.J. suffered substantial physical inju-

ries as a result of the assault. No badge was ever recovered. Pet. App. 4a; Gov't C.A. Br. 17, 20-22.

2. A grand jury sitting in the Eastern District of Wisconsin returned an indictment charging petitioner and four co-defendants with one count of conspiracy to violate federal rights, in violation of 18 U.S.C. 241, and one count of deprivation of federal rights under color of law, in violation of 18 U.S.C. 2 and 18 U.S.C. 242. Indictment 1-4.

At trial, six eyewitnesses placed petitioner at the scene of the assault on F.J. Pet. App. 6a; Gov't C.A. Br. 45. Petitioner testified in his own defense that he was in the house during the assault and did not even see F.J. or his companions at the party. Pet. App. 6a; Pet. 10-12.[1] Another government witness contradicted petitioner's alibi by testifying that she was in the house after F.J. and his group left and did not see petitioner there. Gov't C.A. Br. 45.

Petitioner sought to qualify Otto H. MacLin as an expert on eyewitness identifications and to have him testify at trial about the accuracy of eyewitness identifications in general. See Pet. 12-14. The district court excluded the testimony. Pet. App. 19a-20a. The court stated that it was "not satisfied that [the proffered expert] w[ould] be testifying based upon factors that can be tested, that this witness w[ould] satisfy the requirements for proffering so-called expert testimony for a jury." *Id.* at 19a. The court also noted, *inter alia*, that "jurors are constantly required to assess the credibility of various witnesses and can determine based upon direct and cross examination whether or not a witness is

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[1] The district court subsequently found at sentencing that petitioner's trial testimony had been perjurious. See Gov't C.A. Br. 84.

to be believed," *ibid.*, and that "[a]n expert does not really lend that much more to the trial when he or she testifies that people are affected by the number of times they see a particular person or the things that may have occurred on or about the time of the incident at issue." *Id.* at 20a. The district court concluded that "it would not be appropriate * * * to open the door to extensive examination and cross examination of a witness whose testimony really does nothing more than * * * scrutinize the facts and circumstances that have a bearing on a witness's testimony," which "the jury is required to do" in any event. *Ibid.*

The district court also noted that "there is a general instruction in the packet of instructions that talks about the factors that a jury may consider in determining whether or not to believe a particular witness or a number of witnesses," concluding that "those instructions are sufficient under the circumstance." Gov't C.A. Br. 39. The court invited petitioner to offer additional instructions, but he did not do so. *Ibid.*

The jury found petitioner and two co-defendants guilty on both counts. The third co-defendant was acquitted.[2]

3. The court of appeals affirmed. Pet. App. 1a-18a.

As relevant here, the court of appeals stated that the district court's reasoning "that jurors could determine the reliability of identifications using the evidence from direct and cross examinations" was weak. Pet. App. 7a. The court explained that expert testimony can be of assistance in explaining to the jury "whether their beliefs about the reliability of eyewitness testimony are cor-

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[2] The final co-defendant, Ryan Lemke, entered a guilty plea before trial and testified against petitioner. See Pet. App. 4a-5a.

rect." *Id.* at 8a. But the court concluded that the district court did not abuse its discretion in excluding Dr. MacLin's proffered testimony under Rule 403 of the Federal Rules of Evidence. *Id.* at 8a-9a. As the court explained, "Rule 403 grants discretion to the trial judge" to "balance the benefits of illuminating evidence against the costs of collateral inquiries" that may "sidetrack a trial." *Id.* at 8a. And the court noted that it has often held that "a trial court does not abuse its discretion [under Rule 403] by excluding expert evidence about the reliability of eyewitness testimony," even though the court of appeals fully agreed that "[s]tudy after study has shown very high error rates in the identification of strangers." *Id.* at 7a, 8a.

In this case, the court of appeals held, the district court's decision was a reasonable exercise of gatekeeping discretion, because petitioner did not "show how the [expert's] findings [would] apply to the litigation at hand." Pet. App. 9a. This case involved consistent identification by six witnesses, not one, and some of the six had previously met petitioner. See *id.* at 8a-9a. Petitioner's scientific evidence, by contrast, "concern[ed] identification by single eyewitnesses," a situation in which the absence of corroboration makes the probability of mistake higher. *Id.* at 9a. The court also noted that petitioner had opted to argue for either "an expert on the stand" or "nothing": he did not ask the district court to give an instruction summarizing the relevant scientific knowledge, which a previous opinion had suggested as a useful way of avoiding the need for "a parade of experts." *Ibid.*

The court of appeals considered petitioner's argument that the exclusion amounted to a constitutional

violation and "reject[ed] [it] without comment." Pet. App. 5a.

ARGUMENT

Petitioner renews his argument (Pet. 14-22) that the district court should have permitted him to call his desired expert on the reliability of eyewitness identification evidence. The court of appeals correctly found no abuse of discretion, and that fact-bound decision does not conflict with any decision of another appellate court. Further review therefore is not warranted.

1. The court of appeals did not hold that expert testimony about eyewitness identifications is never admissible. Indeed, it recognized that such testimony can be helpful to the jury. Pet. App. 8a. But Rule 403 of the Federal Rules of Evidence affords the district court discretion to weigh the probative value of such evidence against its potential for prejudice, confusion, and undue delay (among other considerations), and the court of appeals held only that under the circumstances of this case, the district court did not abuse its ample discretion by concluding that the evidence was not sufficiently probative to warrant the trial time that it would have consumed. As this Court has recognized, the application of Rule 403 "requires a fact-intensive, context-specific inquiry." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 128 S. Ct. 1140, 1147 (2008). The district court properly conducted that inquiry here, and the court of appeals' holding that the district court's conclusion was a reasonable one does not warrant further review.

Petitioner cites (Pet. 20-22) cases from other circuits in which expert testimony on these or similar issues was admitted. But as this Court has emphasized, both decisions to admit expert evidence and decisions to exclude

such evidence are reviewed under the same deferential abuse-of-discretion standard. See *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 142 (1997). The cases on which petitioner principally relies apply that standard of review, and they therefore do not establish a per se rule of admissibility any more than the decision below establishes a per se rule of exclusion. That courts reach different results in applying an abuse-of-discretion standard to a fact-intensive, case-specific inquiry such as the one at issue here in no way indicates a split in authority.

Indeed, the Fifth Circuit decision that petitioner cites actually affirmed the *exclusion* of expert testimony on eyewitness identification. As petitioner notes, the panel in *United States* v. *Moore*, 786 F.2d 1308 (5th Cir. 1986), "accept[ed] the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper." *Id.* at 1312. But on the facts of that case, the court held that the district court did *not* abuse its discretion in excluding the testimony in question. *Id.* at 1312-1313; accord, *e.g.*, *United States* v. *Jackson*, 50 F.3d 1335, 1340 (5th Cir. 1995).

The Sixth Circuit decision that petitioner cites also does not support his position, because the court of appeals did not even determine that the expert testimony should have been admitted. See *United States* v. *Smithers*, 212 F.3d 306, 318 (2000). Rather, the court simply held that the district court had erred by not holding a hearing to analyze the expert's testimony under the standard of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and remanded for a *Daubert* hearing. See 212 F.3d at 314.[3] The court also held that

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[3] The court of appeals' reversal in *Smithers* was also partly based on a fact unique to that case: the district court's improper statement that

the evidence could not be excluded under Rule 403 as a discovery sanction to punish defense counsel's purportedly late disclosure of intent to present the expert. See *id.* at 316-317. The court nonetheless acknowledged that unwarranted trial delay *is* a proper basis for exclusion under Rule 403. See *ibid.*[4] The Sixth Circuit has subsequently confirmed that expert testimony on eyewitness identification is not *automatically* admissible: in a case in which the district court did conduct the proper analysis, the Sixth Circuit held that the exclusion of expert testimony on eyewitness identifications was not an abuse of discretion. See *United States* v. *Langan*, 263 F.3d 613, 622 (2001).

Similarly, the Third Circuit has not laid down a hard and fast rule requiring the admission of expert testimony concerning eyewitness identification. Rather, the decisions that petitioner cites carefully examine the proffered evidence and its probative value on the facts of each case. In some instances the court affirmed the

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it excluded the testimony in part because it believed the case would present a "more interesting" jury question without it, an observation that the Sixth Circuit described as "gamesmanship at its worst." 212 F.3d at 314-315.

[4] Similarly, in *Ferensic* v. *Birkett*, 501 F.3d 469 (6th Cir. 2007), a divided panel granted habeas relief based on the state trial court's exclusion of expert testimony as a discovery sanction, a step that the court of appeals concluded was arbitrary under the circumstances. See *id.* at 477-478. The trial court in *Ferensic* did not examine the relevance or probativeness of the expert testimony. And to the extent the court of appeals considered those issues in assessing prejudice, it took pains to note that it "limit[ed] [its] holding to the situation here," where a note from the jury "reflect[ed] the doubts of the jury itself as to the identification of the perpetrator." *Id.* at 484. The district court's ruling in this case involved none of those considerations: it was not a discovery sanction, and the court had no jury note.

exclusion of expert testimony under Rule 403; in others, it concluded that the testimony should have been admitted. Compare *United States* v. *Mathis*, 264 F.3d 321, 340-341 (2001) (affirming exclusion of proffered testimony regarding the effect of an eyewitness's observation time on memory formation and the effect of a first identification on subsequent identifications), cert. denied, 535 U.S. 908 (2002), and *United States* v. *Stevens*, 935 F.2d 1380, 1398-1400 (1991) (affirming exclusion, under Rule 403, of expert testimony concerning the suggestiveness of a photo array used for identification and the problems with multiple successive identifications by the same eyewitness), with *Mathis*, 264 F.3d at 341-342 (reversing exclusion, under Rule 702, of expert testimony concerning (inter alia) the relationship between an eyewitness's confidence and her accuracy and the phenomenon of "weapons focus"), and *Stevens*, 935 F.2d at 1400-1401 (reversing exclusion of similar evidence about confidence-accuracy relationship). In each case, the court of appeals recognized that the district court enjoys substantial discretion. *E.g.*, *Mathis*, 264 F.3d at 338, 341-342; see also *United States* v. *Brownlee*, 454 F.3d 131, 140-144 (3d Cir. 2006) (reversing exclusion of expert testimony under *Daubert* and Rule 702 but not considering any Rule 403 issue).

The decision below does not conflict with the analysis in any of the above cases. The court of appeals acknowledged the potential utility of expert testimony on the reliability of eyewitness identification, but affirmed the district court's case-specific exercise of discretion under Rule 403 to exclude it. See Pet. App. 6a-8a; pp. 4-5, *supra*. Nothing in the cases petitioner cites suggests that

a case with these facts would have been decided differently in another circuit.[5]

2. Petitioner also suggests (Pet. 21) that several other circuits have created a circuit conflict by adopting a rule categorically excluding such expert testimony. The court of appeals in this case did not announce or apply any such rule, however. Petitioner's contention that his evidence would have been *less* favorably received in other circuits does not justify further review.

In any event, petitioner errs in asserting that the circuits are deeply divided on this issue. Petitioner asserts (Pet. 21) that many circuits "routinely exclude[]" expert testimony of this nature, but in fact the cases that petitioner cites simply apply the same fact-sensitive abuse-of-discretion standard as in the circuits discussed above, or in any other expert-evidence case. See, *e.g.*, *United States* v. *Rodríguez-Berríos*, 573 F.3d 55, 71 (1st Cir. 2009) ("[W]e have consistently maintained that the admission of [expert] testimony [about eyewitness identifications] is a matter of case-by-case discretion and have refused to adopt such a blanket rule for its admission or exclusion. We adhere to that position. While such testimony will sometimes comply with the strictures of Federal Rule of Evidence 702 (the rule that governs expert testimony) because it 'will assist the trier of fact to understand the evidence or to determine a fact in issue,' other times it will not.") (citations omitted);

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[5] Petitioner also glosses over the factual, methodological, and practical differences between various categories of expert testimony in this area. Not all expert testimony about eyewitness identification is identical, and decisions reviewing its admissibility have recognized as much. See, *e.g.*, *Mathis*, 264 F.3d at 340-341 & n.7 (identifying four distinct "components" of the proffered expert testimony and reaching varying conclusions about their exclusion).

United States v. *Rodriguez-Felix*, 450 F.3d 1117, 1124-1125 (10th Cir.) (stating that "[w]e [have] rejected a per se rule excluding such expert testimony"), cert. denied, 549 U.S. 968 (2006); accord, *e.g.*, *United States* v. *Martin*, 391 F.3d 949, 954 (8th Cir. 2004) (reviewing for abuse of discretion).

The Eleventh Circuit has arguably taken a somewhat more restrictive view against the admissibility of such testimony, based on precedent predating both *Daubert* and the creation of the Eleventh Circuit. In 1982, Unit B of the Fifth Circuit held that a district court did not abuse its discretion in excluding expert testimony concerning eyewitness identification. *United States* v. *Thevis*, 665 F.2d 616, 641, cert. denied, 456 U.S. 1008, 458 U.S. 1109, and 459 U.S. 825 (1982). That holding became precedent in the new Eleventh Circuit. See *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting decisions of the former Fifth Circuit before October 1, 1981). Thereafter, when affirming rulings excluding such expert testimony, the new court occasionally referred to *Thevis* as establishing that such testimony "is not admissible." *E.g.*, *United States* v. *Holloway*, 971 F.2d 675, 679 (11th Cir. 1992), cert. denied, 507 U.S. 962 (1993). Following *Daubert*, however, the Eleventh Circuit has acknowledged that any rule of "per se inadmissibility" might be subject to re-examination in light of this Court's intervening decision. The Eleventh Circuit has not yet had occasion to do so, however, because it has concluded that its narrower precedent in *Thevis*—that the exclusion of expert testimony about eyewitness identification is not an abuse of discretion—is consistent with *Daubert*. *United States* v. *Smith*, 122 F.3d 1355, 1358 (per curiam), cert. denied, 522 U.S. 1021 (1997). Accordingly, the state of

the law in the Eleventh Circuit is still somewhat uncertain; it would afford no basis for review in this case.

3. Petitioner also contends (Pet. 18-19) that the exclusion of expert testimony on the reliability of eyewitness identifications amounts to a denial of his Fifth and Sixth Amendment rights. The court of appeals correctly rejected that contention, and the court's summary disposition of that issue does not conflict with any other appellate decision.

As this Court has held, "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions" that "'accommodate other legitimate interests in the criminal trial process.'" *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987)). In exercising their right to present witnesses, defendants "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," and "[s]uch rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308 (quoting *Rock*, 483 U.S. at 56). This Court "ha[s] found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Ibid.* It has also recognized that, consistent with the defendant's constitutional right to present a defense, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors

such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes* v. *South Carolina*, 547 U.S. 319, 326 (2006).

The district court's exclusion of expert testimony in this case was not an arbitrary infringement on petitioner's "weighty interest," *Scheffer*, 523 U.S. at 308. The district court rationally and properly concluded that the use of trial time for expert testimony—both petitioner's proffered expert and the rebuttal by the government that would likely have been needed—was not justified by its probative value in a case like this one, in which six separate witnesses attested to petitioner's participation in the beating and a seventh eyewitness refuted petitioner's alibi. As the court of appeals also explained, petitioner's expert did not propose to address "the probability of error when multiple witnesses identify the same person," Pet. App. 9a, thus making the proffered testimony a poor "fit" with the facts of this case. See *Daubert*, 509 U.S. at 591. This Court in *Scheffer* upheld a *categorical* exclusion of a form of expert testimony concerning an ancillary issue of credibility (polygraph results). 523 U.S. at 317. The district court's analysis in this case, which was case-specific rather than categorical, is entirely consistent with this Court's precedents.

In suggesting that a conflict exists on this issue, petitioner relies primarily upon the Sixth Circuit's decision in *Ferensic* v. *Birkett*, 501 F.3d 469 (2007). In that case, the state court excluded the evidence "simply because Ferensic had failed to comply with a pretrial discovery order." *Id.* at 482. As noted, that was not the basis for the exclusion here. See note 4, *supra*. In any event, this Court has rejected the notion that the constitutional right to put on a defense precludes ever imposing such

a discovery sanction, see *Taylor* v. *Illinois*, 484 U.S. 400, 410-416 (1988), and the court in *Ferensic* reached a different result only because of facts "*in th[at] specific case*" showing that the discovery violation actually caused no prejudice to the prosecution. 501 F.3d at 477; see also *id.* at 479 (noting the "admittedly fact-intensive" analysis by which the court concluded that the sanction was disproportionate).

4. Even if there were a conflict warranting this Court's review of the standards under the Rules of Evidence or the Constitution for admitting expert testimony on eyewitness identification, this case would be an inappropriate vehicle, because there is ample evidence of petitioner's guilt and any error in excluding petitioner's proffered expert was harmless and not material. See Fed. R. Crim. P. 52(a); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). As the court of appeals noted, petitioner was identified by six different eyewitnesses, not all of whom were strangers to petitioner. See, *e.g.*, Trial Tr. 443-444 (Jodi Kamermeyer had spent time talking to petitioner earlier in the evening and had paid particular attention to him because she had thought he was good-looking); *id.* at 786, 793 (Jon Clausing had met petitioner earlier in the evening and observed that he was intoxicated). Others had direct, up-close contact with petitioner during the incident. See Pet. App. 3a (before kicking F.J. in the groin, petitioner told Officer Nicole Martinez, "I'm really sorry you have to see this"); Trial Tr. 629 (petitioner "came up to [Mariah Gagnon's] face and told [her she] better shut up").[6]

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[6] The court of appeals' statement that four of the eyewitnesses "knew [petitioner] well," Pet. App. 8a, overstates the testimony.

The jury also had an opportunity to evaluate petitioner's theory of mistaken identification, see Pet. 17, when petitioner was allowed to call to the witness stand the other defendant whom petitioner claimed he resembled and permit the jury to see him. Gov't C.A. Br. 46; see also *id.* at 46 n.19 (noting that eyewitnesses who personally knew the other defendant specifically testified that they did not confuse him with petitioner). And petitioner had the opportunity to tell his own story from the witness stand. His alibi was refuted by another eyewitness, and the jury evidently did not credit his story. Nor did the district court, which found at sentencing that petitioner had testified perjuriously. See note 1, *supra*. As the court of appeals correctly observed, this is not a conviction that turned on a single eyewitness's recollection of her fleeting observation of a complete stranger. The ample evidence of petitioner's guilt confirms that no further review of the district court's evidentiary ruling is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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